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No. 84-1692

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALLAN HARVEY BIBBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the court of appeals erred in affirming his conviction on the ground that the misjoinder of three counts in a 20 count indictment was harmless error.

1. Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, six counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner was sentenced to concurrent terms of 42 months' imprisonment and fined $10,000. The court of appeals affirmed except with respect to one of the wire fraud counts (Pet. App. A1-A22; 752 F.2d 1116).[1]

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[1]Co-defendants Edgar Gillock and A. Arthur Ayers were convicted on the same nine counts as petitioner; Gillock was also convicted on one count of extortion, in violation of 18 U.S.C. 1951, and one count of tax evasion, in violation of 26 U.S.C. 7201. Gillock was acquitted on three

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner, a former executive for Honeywell Information Systems, Inc., defrauded Honeywell in the course of certain sales of the corporation's computer equipment. Petitioner received substantial kickbacks out of the profits of these sales. In order to conceal the payments from his employer, petitioner funnelled certain of his profits through cattle ranching operations. Pet. App. A1-A5.

Petitioner moved prior to trial to sever his trial from that of his co-defendant Gillock, who, unlike petitioner, was charged with various tax offenses in addition to the conspiracy and fraud counts (see note 1, *supra*). The district court denied this motion. On appeal, the court of appeals concluded that three of the tax counts were misjoined with the counts charging petitioner, in violation of Fed. R. Crim. P. 8(b).[2] Pet. App. A6-A7. Relying on its decision in *United States* v. *Hatcher,* 680 F.2d 438 (6th Cir. 1982), however, the court of appeals held that misjoinder may constitute harmless error (Pet. App. A8). After examining the indictment and trial testimony, the court concluded that it was so "unlikely that any of the defendants were actually harmed by the misjoinder" (*ibid.*) that the failure to sever under Fed. R. Crim. P. 8(b) was properly regarded as harmless error.

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counts of making false tax returns, in violation of 26 U.S.C. 7206, and a mistrial was declared with respect to six of the counts charging him with extortion. The court of appeals affirmed both co-defendants' convictions, except for one wire fraud count and Gillock's conspiracy count.

[2]Fed. R. Crim. P. 8(b) provides in part that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

2. Petitioner contends (Pet. 5-7) that misjoinder may never be considered harmless error.[3] This question is identical to that presented in *United States* v. *Lane*, cert. granted, No. 84-744 (Feb. 19, 1985). It is therefore respectfully submitted that the petition for a writ of certiorari in this case should be held pending the Court's decision in *Lane*, and then disposed of as appropriate in light of that decision.

REX E. LEE
Solicitor General

MAY 1985

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[3]Petitioner also argues (Pet. 7) that even if misjoinder may be harmless, the court of appeals erred in concluding that the error was harmless in this case. This factbound contention obviously merits no further review. The court of appeals correctly decided the question in view of the relatively insignificant attention devoted to the misjoined counts at trial, the jury's acquittal of Gillock on those counts, and the discrete nature of the misjoined tax offenses (Pet. App. A8-A10).